SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1290

CHARLES A. A'HEARN,

Petitioner,

v.

COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION,

Respondent.

PETITIONER'S REPLY BRIEF

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I

Respondent's contention that "all" petitioner "need do is assert (on the witness stand) his privilege under the Fifth Amendment" (Brief, p. 17) is particularly monstrous, coming as it does from a bar association organized for the purpose of "facilitating the administration of justice"* and pretending to act as an "arm" of a court—a pretension unsupported by evidence of so acting, or by

* New York Membership Corporations Law, Sec. 11 (7); McKinney's Consolidated Laws of New York Annotated, Book 34, Sec. 11 (7).

statutory authorization. Respondent's contention ignores completely the Fourth and Sixth Amendments, the due process clause of the Fifth and Fourteenth Amendments, and the stigma attached to "taking the Fifth". No target of an investigation of crime may be placed on the witness stand and subjected to questioning under oath unless he has been brought to the witness stand in compliance with constitutional requirements of reasonableness and probable cause, the due process requirement of the Fifth and Fourteenth Amendments, and the Sixth Amendment guarantee of the right to be informed of the nature and cause of the accusation.

There is no difference in principle between an inquisition of a person suspect of a crime by the arresting officer before a desk sergeant-referee, than an inquisition of such a person by the attorney for a bar association before a sergeant-at-arms committee member referee. The latter procedure is indeed more repugnant to our system of justice than the former. In the latter situation, the questioning is under oath and the inquisitor and the referee member of the inquisitor's employer are both lawyers skilled in the "subtler devices" of making a suspect "the unwilling collaborator in establishing his own guilt" (*Culombe* v. *Connecticut,* 367 U. S. 568, 574-575 (1961). The "blood of the accused is not the only hallmark of an unconstitutional inquisition" (*Blackburn* v. *Alabama,* 361 U. S. 199, 206 (1960)).

II

In re Murchison, 349 U. S. 133 (1955), this Court stated, page 137:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. * * * Having been part of that process a judge cannot be, in the very nature of things, wholly

> disinterested in the conviction or acquittal of the accused."

See also *Tumey* v. *Ohio,* 273 U. S. 510, 534 (1927).

In clear repudiation of this rule of elemental fairness, the majority of the Appellate Division, Third Department, here held (A50):

> "* * * it would be unreasonable indeed to deny to the court inquisitorial powers at least equal to those possessed by a Grand Jury * * *."

That a court may not be both investigator and judge was indeed, recognized instinctively by the learned Appellate Division, First Department, promulgator of Rule XII-A, when, on its own motion, and "in furtherance of justice" (N. Y., CPLR 5711), it declined to hear petitioner's appeal from the order denying his motion to quash the subpoena *duces tecum* and transferred the appeal to the Appellate Division, Third Department (A39-A40). With all due respect to the Appellate Division, the denial of due process inherent in a court conducted or sponsored criminal investigation procedure is not remedied by a transfer of the judging part of the procedure to another geographical department of the investigating court. The Court, by this procedure, renounces its jurisdiction and becomes a partisan and petitioner's adversary as is evident from respondent's pretension to be an arm of the court. Petitioner's recourse to this Court for his constitutional rights is, therefore, particularly necessary in these circumstances. That this is so further appears from the decision of the New York Court of Appeals upholding issuance of the subpoena to petitioner, notwithstanding its issuance without even a "slender" showing of cause, and the Court's determination that Rule XII-A "Significantly" requires a showing of cause as a "condition precedent" to issuance of such a subpoena (App. A to Petition, pp. 27-28).

III

The day the instant petition for certiorari was filed, this Court granted certiorari in *Morales* v. *New York* (22 N Y 2d 55), involving the issue of "investigative seizure" left undecided in *Terry* v. *Ohio,* 392 U. S. 1 (1968). The issue in *Morales,* as stated page 10 of the petition for certiorari in that case, is:

> "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention and/or investigation.' "

The same issue of personal security is presented here. In *Morales* the seizure was by force of the police for the purpose of an investigation of crime. Here the seizure, and search too, are by force of a subpoena *duces tecum* for the same purpose. The result is the same. The personal security of a citizen has been intruded upon without probable cause. In both cases a citizen has been subjected to the harassment and ignominy incident to involuntary investigatory detention. In both cases, the object of the detention is to establish out of the mouth of the citizen that he is guilty of a crime. In both cases, the "central inquiry under the Fourth Amendment" is the same; "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (*Terry* v. *Ohio, supra,* 392 U. S. 1, 19; see also, *Davis* v. *Mississippi,* —— U. S. —— (April 22, 1969).

The subpoena *duces tecum* here was obtained from a clerk of court on the bare statement of respondent that it had "cause to believe" that petitioner "is unlawfully practicing law" (A30-A31). No facts were alleged in support of such statement. Nor were any supporting facts alleged by respondent in opposition to the motion to quash. When a bar association committee undertakes to make a person a target of an investigation of conduct that is criminal it is not a neutral; it has an "axe to grind." Its bare state-

ment of "cause to believe" is not an unbiased conclusion of an infallible authority. As this Court recently held in *Sibron* v. *New York,* 392 U. S. 40, 59 (1969):

> "* * * No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment."

A private membership bar association is not an agent of the public and has no right to intrude upon the personal security of any citizen. But if it is such an agent, and has such authority, the Fourth Amendment governs its intrusion here, as it does "all intrusions by agents of the public upon personal security" (*Terry* v. *Ohio, supra,* 392 U. S. 1, 18; see also *infra,* pp. 6-7).

IV

In *Matter of Murray* v. *Murphy,* 24 N Y 2d 150 (1969), the New York Court of Appeals, only two months after its decision in the instant case, said, page 157:

> "The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose fundamental rights because of wrongdoing shown by evidence, but not charged. (*Matter of Ruffalo,* 390 U. S. 544; *Matter of Shapiro* v. *Board of Regents,* 16 N Y 2d 783; *Matter of Hecht* v. *Monaghan,* 307 N. Y. 461, 473-474; *Cole* v. *Arkansas,* 333 U. S. 196; *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 339-340)."

This principle, settled by this Court's decision in the *Ruffalo* case, which petitioner unsuccessfully relied upon below, was not followed in the instant case. Petitioner is

being investigated for a crime without charges. If, upon evidence he produces in response to the subpoena *duces tecum,* his investigator then charges wrongdoing, he too will have lost "substantial rights because of wrongdoing shown by evidence, but not charged." A subpoena *duces tecum* process is not due process when utilized to command the production of evidence that places the person subpoenaed in jeopardy of losing "substantial rights." As the New York Court of Appeals further said in *Matter of Murray,* 24 N Y 2d 157:

> "* * * Where we are involved with such a fundamental right as the right to be put on notice of the charges made, prejudice will be presumed."

The same Court was involved with the same fundamental right in the instant case and came to a completely opposite conclusion contrary to its own earlier decisions and contrary to decisions of this Court. The explanation for this disparity of treatment of a fundamental right may not be grounded on a proposition that the "first fundamental of due process" is inapplicable to an investigation of crime by a court with the aid of a bar association.

The denial to petitioner by the Court below of that "fairness" which the Court below in *Matter of Murray* recognized to be "elemental" (24 N Y 2d 157), is so plain as to merit review and correction by this Court.

V

Respondent's reliance upon grievance committee cases involving professional misconduct of lawyers is misplaced. Unauthorized practice of law is a crime, not a matter for disciplinary action by the Appellate Division whch has exclusive original jurisdiction over lawyer disciplinary proceedings under Section 90 of the New York Judiciary Law (*Matter of Erlanger,* 20 N Y 2d 778, 779 (1967); *Waldo* v. *Schmidt,* 200 N. Y. 199 (1910).

Matter of Association of the Bar of the City of New York, 222 App. Div. 580 (1st Dept., 1928), which respondent says involved essentially the "same procedure" with an "identical result" (Brief, p. 10), like other cases relied upon by respondent, involved an "ambulance chasing" investigation. The unreliability of such decision is further evident from the fact that it was an advisory non-adversary opinion whereby the petitioners, without notice to any adversary, "fortified themselves in advance by judicial instruction;" an opinion contrary to the "function of courts" to "determine controversies between litigants" (*Matter of State Industrial Comm.*, 224 N. Y. 13, 16 (1918).

Respondent has not cited any case involving or upholding an investigation by the Appellate Division or by any other court of unauthorized practice of law. Respondent is in error in saying "that the situation herein is truly indistinguishable from that which pertained in *Clark* v. *State of Washington,* 386 F. 2d 678 (9th Cir. 1966)" (Brief, p. 15). *Clark* was also a disciplinary proceeding case. Moreover, the State of Washington, unlike New York, has an integrated "State Bar" created by statute as "an agency of the state" with statutory power over unlawful practice of law (Revised Code of Washington, Annotated, Title 2, Secs. 2.48.010-2.48.180). Respondent is not an agency of the State of New York for any purpose; it is nowhere charged with enforcement of the prohibitions of unlawful practice of law; its contention that it is an arm of the Appellate Division is without basis in law or precedent in fact. A constitutional court has only such arms as are provided for by constitution and statute.

Respectfully submitted,

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June, 1969.